REMARKS

Favorable reconsideration and allowance of the present application is respectfully requested.

Currently, claims 23-49, including independent claims 23, 46, and 49 are pending in the present application. Independent claim 23, for instance, is directed to a breath testing device comprising a visual indicating agent that is color sensitive to at least one odorous compound present in the breath of a user. As indicated above, claim 23 also requires the presence of nanoparticles, such as previously set forth in dependent claim 6. The nanoparticles may, for instance, allow the visual indicating agent to be present over a greater surface area, thereby improving its chances of sensing low amounts of odorous compounds. This may consequently enhance the detection sensitivity of the breath testing device. (See e.g., p. 7).

In the Office Action, dependent claim 6 was rejected under 35 U.S.C. §103(a) as being unpatentable based on two primary references, namely U.S. Patent App. Publication No. 2001/0056246 to Rodriquez-Fernandez and U.S. Patent No. 3,507,269 to Berry. Neither Rodriquez-Fernandez nor Berry discloses a breath testing device containing nanoparticles. Nonetheless, the Office Action relied on a secondary reference, i.e., U.S. Patent Appl. Publication No. 2003/020309 to MacDonald, et al., for the teaching of a color change indicator containing nanoparticles.[1]

[1] Original claim 6 depended from claim 4. Claim 4 was rejected under Rodriquez-Fernandez or Berry in view of U.S. Patent No. 3,615,478 to Hoshino. Hoshino was relied on solely for the teaching of Michler's hydrol as a color indicator. Because independent claims 23, 46, and 49 do not require Michler's hydrol, however, Hoshino is not discussed in detail herein.

The Office Action indicated that MacDonald, et al. is available as prior art under 35 U.S.C. §102(e). However, 35 U.S.C. §103(c) states that a U.S. patent or publication that qualifies as prior art only under §102(e), (f), or (g) is not available as prior art if the patent/publication and the claimed invention were, at the time the invention was made, subject to an obligation of assignment to the same person. In this case, MacDonald, et al. and the present application were both subject to assignment to "Kimberly-Clark Worldwide, Inc." Specifically, an assignment of the present application to Kimberly-Clark Worldwide, Inc. was formally executed on February 16, 2004. Likewise, an assignment of MacDonald, et al. to Kimberly-Clark Worldwide, Inc. was formally executed on April 26, 2002 (recorded at Reel and Frame Nos. 012862/0470). Accordingly, Applicants respectfully submit that MacDonald, et al. is not available as prior art to the present application under 35 U.S.C. §102(e)/103.

In any event, Applicants respectfully submit that there is no suggestion whatsoever in either Rodriquez-Fernandez or Berry to use nanoparticles as set forth in the present claims. Instead, the references are directed to very particular devices for controlling halitosis. Moreover, any modification of the above-cited references to use such nanoparticles would rely on the impermissible use of hindsight that cannot be successfully used to support a *prima facie* case of obviousness under 35 U.S.C. §103.

Thus, for at least the reasons set forth above, Applicants respectfully submit that the present application is in complete condition for allowance and favorable action, therefore, is respectfully requested. Examiner Nasser is invited and encouraged to telephone the undersigned, however, should any issues remain after consideration of this amendment.

Please charge any additional fees required by this Amendment to Deposit Account No. 04-1403.

Respectfully requested,

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